Harun bin Abdullah v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO B-09-02 OF 1997
SHAIK DAUD, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
26 MARCH 1998

Criminal Procedure *— Trial — Close of prosecution's case — Trial judge applied prima facie test — Whether beyond reasonable doubt test should have been applied — Whether trial judge had misdirected herself*

Criminal Procedure *— Trial — Misdirection — Misdirection by trial judge on burden of proof — Breach of a provision in the Criminal Procedure Code (FMS Cap 6) — Breach of a principle of general importance in the administration of justice — Whether breach could be cured — Whether there was substantial miscarriage of justice — Criminal Procedure Code (FMS Cap 6) s 422 — Courts of Judicature Act 1964 s 60(1)*

The appellant had been found guilty and convicted by the sessions court for an offence committed in 1991. In 1995, he was sentenced to five years' imprisonment and fined. His appeal to the High Court was dismissed on 18 January 1997. The appellant appealed against the dismissal, inter alia, on the ground that the High Court judge who heard the appeal was in error in not concluding that the trial judge in the sessions court — who relied on the prima facie test at the close of the case for the prosecution when calling for the defence of the appellant — was wrong in applying the wrong burden of proof which was illegal and not curable under s 422 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') or the proviso to sub-s (1) of s 60 ('the proviso') of the Courts of Judicature Act 1964. Counsel for the appellant said that since the sessions court judge had adopted the prima facie test, this was a misdirection on the burden of proof which rendered the whole proceedings an illegality. The learned deputy public prosecutor submitted that although the learned sessions court judge had applied the wrong standard of proof, that should not vitiate the conviction as even if she had applied the right test, the result would have been the same. Consequently, he submitted that there had been no substantial miscarriage of justice and thus the proviso to the subsection applied.

Held, allowing the appeal and setting aside the conviction and sentence:

(1) The sessions court judge had misdirected herself when she applied the prima facie test. Applying the more stringent reasonable doubt test to the facts of this case on the evidence available, the result would not be the same as no case had been made out against the appellant beyond reasonable doubt. Consequently, the defence of the appellant should not have been called (see p 12E–F).

(2) Section 422 of the CPC cannot be invoked to cure a breach where it involves the breach of an explicit provision of the CPC or where the breach involves a principle of general importance in the administration of justice. As the error committed by the learned sessions court judge in misdirecting herself on the standard of proof on the prosecution fell within both the classifications in the instant appeal, it was not capable of rectification under s 422 of the CPC (see p 9F–G); *Ishak Shaari v PP* [1997] 3 CLJ Supp 223 followed.

(3) The proviso was not applicable to the situation in this case as a substantial miscarriage of justice had occurred (see p 13B).

[Bahasa Malaysia summary

Perayu telah didapati bersalah dan disabitkan oleh mahkamah sesyen untuk satu kesalahan yang dilakukan pada tahun 1991. Pada tahun 1995, beliau telah dijatuhkan hukuman penjara selama lima tahun dan dikenakan denda. Rayuannya kepada Mahkamah Tinggi telah ditolak pada 18 Januari 1997. Perayu telah merayu terhadap penolakan tersebut, antara lain, atas alasan bahawa hakim Mahkamah Tinggi yang mendengar rayuan telah terkhilaf dalam tidak memutuskan bahawa hakim perbicaraan di mahkamah sesyen — yang telah bergantung pada ujian prima facie ketika penamatan kes bagi pihak pendakwa semasa memanggil pembelaan perayu — adalah salah dalam memakai beban membukti yang salah yang mana adalah tak sah dan tidak boleh dipulihkan di bawah s 422 Kanun Acara Jenayah (NMB Bab 6) ('KAJ') atau proviso kepada s 60(1) ('proviso tersebut') Akta Mahkamah Kehakiman 1964. Peguam bagi pihak perayu telah menyatakan bahawa oleh kerana hakim mahkamah sesyen telah menerima-pakai ujian prima facie, ini merupakan satu salah arah atas beban membukti yang mana menjadikan keseluruhan prosiding tersebut suatu kepenyalahan undang-undang. Timbalan pendakwa raya yang bijaksana telah berhujah bahawa walaupun hakim mahkamah sesyen yang bijaksana telah memakai darjah membukti yang salah, hal itu tidak seharusnya menjadikan tak sah sabitan tersebut kerana walaupun jika beliau telah memakai ujian yang betul, keputusannya sudah pasti sama. Akibatnya, beliau berhujah bahawa tidak terdapat salah laksana keadilan yang substansial dan dengan itu proviso tersebut menjadi terpakai.

Diputuskan, membenarkan rayuan dan mengetepikan sabitan dan hukuman:

(1) Hakim mahkamah sesyen telah tersalah arah dirinya sendiri apabila beliau memakai ujian prima facie tersebut. Memakai ujian keraguan munasabah yang lebih ketat kepada fakta-fakta kes ini berdasarkan keterangan yang ada, keputusannya tidak mungkin sama kerana tiada kes telah diwujudkan terhadap perayu melampaui keraguan munasabah. Akibatnya, pembelaan perayu tidak seharusnya dipanggil (lihat ms 12E–F).

(2) Seksyen 422 KAJ tidak boleh digunakan untuk memulihkan sesuatu kemungkiran di mana ia melibatkan kemungkiran peruntukan nyata KAJ atau di mana kemungkiran itu melibatkan prinsip yang penting secara umumnya dalam pentadbiran keadilan. Oleh kerana kesilapan yang dilakukan oleh hakim mahkamah sesyen yang bijaksana dalam salah mengarahkan dirinya sendiri atas darjah membukti tersebut terhadap pihak pendakwa jatuh di dalam lingkungan kedua-dua klasifikasi dalam rayuan ini, ia tidak boleh diperbetulkan di bawah s 422 KAJ (lihat ms 9F–G); *Ishak Shaari v PP* [1997] 3 CLJ Supp 233 diikut.

(3) Proviso tersebut tidak terpakai kepada keadaan dalam kes ini kerana salah laksana keadilan yang substansial telah berlaku (lihat ms 13B).]

Notes

For cases on the close of prosecution's case, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2899–2915.

For a case on misdirection, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 3026.

Cases referred to

A Ragunathan v PP [1982] 1 MLJ 139 (refd)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (refd)
Haw Tua Tau v PP [1981] 2 MLJ 49 (refd)
Ishak Shaari v PP [1997] 3 CLJ Supp 223 (folld)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265 (refd)
Loh Kam Foo v PP [1997] 1 CLJ Supp 221 (refd)
Mohd Jalani bin Saliman v PP [1997] 5 MLJ 551 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Nicholas Webb Edwards (1983) 77 Cr App R 5 (refd)
S Govindasamy v PP [1949] MLJ 101 (refd)
Surandran a/l Rajaretnam v PP [1998] 2 MLJ 49 (refd)
Tan Boon Kean v PP [1995] 3 MLJ 514 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 4, 60(1)
Criminal Procedure Code (FMS Cap 6) ss 180, 198(i), 316, 422
Firearms (Increased Penalties) Act 1971
Penal Code (FMS Cap 45) s 467

Appeal from: Criminal Appeal No 42–34 of 1995 (High Court, Shah Alam)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Ganesan Somasundram (Deputy Public Prosecutor) for the respondent.

Abdul Malek Ahmad JCA (delivering judgment of the court): The appellant had been found guilty and convicted by the sessions court under s 467 of the Penal Code (FMS Cap 45) ('the Code'). The original charge against him read as follows:

> That you on 14 October 1991, at Lot 663, Jalan Kelinik, in the district of Kuala Selangor, in the state of Selangor Darul Ehsan, did forge a valuable security, that is, a licence to purchase firearm and ammunition, bearing serial No B274599 authorizing the false transfer of firearm ownership to Lee Poh Sin IC No 3235499 and dishonestly using the forged valuable security as genuine which you have reason to believe that it is forged and therefore you have committed an offence under s 467 of the Penal Code read together with s 471 of the same Code.

Before the last prosecution witness was recalled, the prosecution tendered the following amended charge:

> That you on 14 October 1991, at Lot 663, Jalan Kelinik, in the district of Kuala Selangor, in the state of Selangor Darul Ehsan, did forge a valuable security, that is, a licence to purchase firearm and ammunition, bearing serial No B274599 authorizing the false transfer of a firearm to Lee Poh Sin IC No 3235499 and dishonestly using the forged valuable security as genuine which you have reason to believe that it is forged and therefore you have committed an offence under s 467 of the Penal Code and punishable under the same section of the Code.

He was sentenced to five years' imprisonment and fined RM5,000 or one year's imprisonment in default by the sessions court on 18 October 1995. The High Court dismissed his appeal on 18 January 1997.

The appeal came before us on 2 March 1998 when learned counsel for the appellant presented his motion to add another ground to the petition of appeal, which had been filed on 31 October 1997 and which had already listed 13 grounds. The additional ground was that the learned High Court judge who heard the appeal was in error in not concluding that the learned trial judge in the sessions court — who relied on the prima facie test at the close of the case for the prosecution when calling for the defence of the appellant — was wrong in applying the wrong burden of proof and which was illegal and not curable under s 422 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') or the proviso ('the proviso') to sub-s (1) of s 60 ('the subsection') of the Courts of Judicature Act 1964 ('the Act').

We had allowed the motion as the learned deputy public prosecutor did not object. The matter was adjourned to the following day when learned counsel for the appellant, in arguing this additional ground, said that since the sessions court judge had adopted the prima facie test, this was a misdirection on the burden of proof which rendered the whole proceedings an illegality.

The subsection provides:

> 60 Powers of Court of Appeal
>
> (1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant

A or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High Court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:

B Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

He then cited the landmark Supreme Court decision in *Khoo Hi Chiang v* C *PP and another appeal* [1994] 1 MLJ 265 where Edgar Joseph Jr SCJ ended his judgment in the following manner (at pp 292–293):

In the circumstances, although the judge applied the *Haw Tua Tau* [1981] 2 MLJ 49 test — which, in our view, was the wrong test — when calling for the defence, we consider that the error was of no consequence, and did not vitiate the convictions, because, even had he applied the more stringent test D to which we have referred and discussed, we are completely convinced that the result would have been the same, having regard to the absolutely overwhelming nature of the case for the prosecution. We are therefore satisfied that no substantial injustice has actually occurred and so we apply the proviso to s 60 of the Courts of Judicature Act 1964, which says:

E 'Provided that the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.'

Accordingly, we have no hesitation in dismissing these appeals and confirming the convictions and sentences of death passed against both the appellants.

F *Khoo Hi Chiang*'s case had extensively dealt with the test adopted by the Privy Council in *Haw Tua Tau v PP* [1981] 2 MLJ 49 which only required a minimal evaluation of the evidence at the close of the prosecution's case just to ensure it is not inherently incredible. This was followed by the Federal Court in *A Ragunathan v PP* [1982] 1 MLJ 139 and by the G Supreme Court in *Munusamy v PP* [1987] 1 MLJ 492. In the end, the three to two decision in *Khoo Hi Chiang* went the other way when the Federal Court decided that a maximum evaluation of the evidence tendered by the prosecution was necessary before calling upon the defence to answer.

H We were reminded by learned counsel that, as regards the proviso, there is no similar corresponding provision for appeals, as in the instant case, from the sessions court to the High Court and only s 422 of the CPC could apply. The said section states:

Irregularities not to vitiate proceedings

I Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account —

of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial,

or in any inquiry or other proceedings under this Code; or

of the want of any sanction required by section 129; or

of the omission to settle or revise any list of jurors or assessors; or

of the want of qualification of any juror or assessor; or

of the improper admission or rejection of any evidence; or

of any misdirection in any charge to jurors or assessors;

unless such error, omission, improper admission or rejection of evidence, irregularity, want or misdirection has occasioned a failure of justice.

Just for the record, this section has since been amended by the Criminal Procedure (Amendment) Act 1998 (Act A1015) which received royal assent on 4 March 1998 and which was published in the Gazette on 19 March 1998 but which has yet to come into force. The amended section reads:

Irregularities not to vitiate proceedings

Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of —

(a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code;

(b) the want of any sanction; or

(c) the improper admission or rejection of any evidence,

unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

It is obvious that the amendment is merely to update the provision consequent to the abolition of jury trials.

It was the submission of learned counsel that as an appeal is a rehearing, and in this case it is a second rehearing, it is within the powers of this court to invoke the proviso. In conclusion, he referred us to s 4 of the Act which states:

Provision to prevent conflict of laws

In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.

We must, however, point out that the subsection excluding the proviso, which applies to appeals from the High Court to this court, has the same effect as s 316 of the CPC which applies to appeals to the High Court. The said section states:

Decision on appeal

At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may —

(a) in an appeal from an order of acquittal, reverse such order, and direct that further inquiry made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from conviction or in an appeal as to sentence (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried or committed for trial; or (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;

(c) in an appeal from any other order, alter or reverse such order.

In his rather brief reply, the learned deputy public prosecutor submitted that although the learned sessions court judge had applied the wrong standard of proof, that should not vitiate the conviction as even if she had applied the right test, the result would have been the same. Consequently, he said that there had been no substantial miscarriage of justice. For that reason, he agreed that the proviso applies.

We were not at all surprised by the stand taken by the learned deputy public prosecutor because it is manifestly clear that the proviso is to the advantage of the prosecution. But reference to the proviso by learned counsel must actually mean the reference to the subsection excluding the proviso.

It is pertinent, therefore, to highlight some of the High Court decisions on this point sitting as a court of appeal. In *Loh Kam Foo v PP* [1997] 1 CLJ Supp 221, it was an appeal by the appellant against his conviction for two offences under the Firearms (Increased Penalties) Act 1971. The only ground of appeal was that the trial court had seriously misdirected itself at the close of the prosecution case on the required standard of evaluation of the prosecution evidence. The trial court had ordered the appellant to enter his defence after it was satisfied that there was a 'prima facie case without reasonable doubt'.

It was held by the High Court (Jeffrey Tan J) that (at p 223):

[5] The expression 'prima facie case' although not in the Code ('the CPC') has long been in use in the courts, 'often for brevity and convenience to denote a case to answer, or more particularly, a case "which if unrebutted would warrant a conviction" within the meaning of' s 173 or s 180 or s 190 of the Code, as the case may be.

[6] The expression 'prima facie case' must be distinguished from what constitutes a prima facie case. What constitutes a prima facie case is not spelt out in the statutes but is enunciated by the courts. However, judicial opinion is not exactly immune to modifications and adjustments, drastic changes even, and so what constitutes a prima facie case has had to follow the drift, and the ebb and flow of judicial opinion, although the expression, prima facie case, for brevity and convenience to denote a case to answer, has not been affected by judicial opinion on what constitutes a prima facie case.

[7] In the instant case, the trial court used the expression prima facie case, not to denote a prima facie case forged on prima facie evidence, but to denote the case which needed the appellant's answer. That case was undoubtedly a beyond reasonable doubt case, as the trial court acknowledged not only the maximum evaluation benchmark, but also scrutinized and evaluated the prosecution evidence. The supposed weakness of the judgment was the finding of a prima facie case. However, it should not be assumed, just by the use of the expression prima facie

case alone that there was a throwback to the *Haw Tua Tau* benchmark, as prima facie case was long in use before *Haw Tua Tau*. The expression prima facie case was not fatal, for there was a scrutiny and evaluation of the prosecution evidence, and like the rose by any other name the case at the close of the prosecution evidence was a case proved beyond reasonable doubt. (Emphasis added.)

In *Ishak Shaari v PP* [1997] 3 CLJ Supp 223, the appellant/accused appealed against the decision of the learned sessions court judge stating that there was a misdirection by the said learned judge on the standard of proof. The substantial issue for determination in the appeal was the effect of the misdirection by the learned judge on the standard of proof in the criminal trial.

The findings of the High Court (Augustine Paul JC) in that case were as follows (at p 223):

[1] Based on the Federal Court judgment in *Bahruni bin Ismail v PP* [1997] 2 MLJ 265, the recent amendment to the CPC providing for a prima facie standard of proof af the close of the prosecution case did not have a retrospective effect in the absence of anything in the amendment to suggest a contrary intention. As such, the law prior to the amendment applied to the instant appeal.

[1a] The law prior to the amendment was that the prosecution must prove its case beyond reasonable doubt before an accused can be called upon to enter his defence as per Eusoff Chin Chief Justice's landmark judgment in *Arulpragasan all Sandaraju v PP* [1997] 1 MLJ 1 and s 173 of the CPC.

[1b] The errors made by the learned sessions court judge were the combination of the two standards of proof at the end of the prosecution case, and the omission to make a finding at the end of the whole case that it was proved beyond reasonable doubt. The learned sessions court judge, therefore, misdirected himself on the standard of proof required of the prosecution.

[2] Section 422 of the CPC cannot be invoked to cure a breach where it involves the breach of an explicit provision of the CPC or where the breach involves a principle of general importance in the administration of justice.

[2a] The rules relating to the burden of proof are expressly provided for in the CPC and also constitutes principles of general importance to the administration of criminal justice.

[2b] As the error committed by the learned sessions court judge in misdirecting himself on the standard of proof on the prosecution fell within both the classifications it was incapable of rectification under s 422 of the CPC.

[3] The conviction could not be confirmed under s 316(b)(ii) of the CPC in view of the fundamental nature of the breach as the misdirection on the rules relating to the burden of proof was fundamental.

[4] The Supreme Court's decision in *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 could not be followed, wherein it was held that the wrong standard of proof applied by the High Court did not vitiate the conviction as long as no substantial miscarriage of justice occurred. This was because

A the power under which the Supreme Court acted was a power that was specially enacted for that court and the Court of Appeal in the Courts of Judicature Act 1964. However, no such power is given to the High Court.

[4a] Even if the instant court had the power to act as the Supreme Court did in *Khoo Hi Chiang*, it would not be able to do so in view of the B learned sessions court judge's misdirection on the requirements of corroboration which is critical in cases involving sexual offences as in the instant appeal.

Also on the same point in *Mohd Jalani bin Saliman & Anor v PP* [1997] 5 MLJ 551, the High Court (Abdul Malik Ishak J) held, in dismissing the C appeal but varying and substituting the sentences, that the appellants who were duly represented before the trial court had a fair trial, where from the tenor of the evidence adduced, the prosecution had overwhelmingly established all the ingredients of the charges levelled against them. The choice of words by the trial court so as to put to the forefront the prima facie test, as compared to the beyond reasonable doubt test, was necessitated D by the prevailing law at the material time and consequently, there was no miscarriage of justice at all. The evidence adduced, so overwhelmingly strong, had in fact established the case beyond reasonable doubt. Indeed, if there was an omission by the trial court which was not the case there, that omission was curable under s 422 of the CPC. The evidence led by E the prosecution before the trial court was overwhelmingly strong and cogent. Therefore, the prosecution had adduced evidence in accordance with the burden of proof as envisaged in *Arulpragasan a/l Sandaraju v PP* (distinguishing *Arulpragasan a/l Sandaraju v PP*; following *Tan Boon Kean v PP* [1995] 3 MLJ 514 and *Nicholas Webb Edwards* (1983) 77 Cr App R 5).

F Of these three decisions, we must say that we are in full agreement with the decision in *Ishak Shaari v PP* where the learned trial judge held that s 422 of the CPC cannot be invoked to cure a breach where it involves the breach of an explicit provision of the CPC or where the breach involves a principle of general importance in the administration of justice. And as the error committed by the learned sessions court judge in misdirecting G herself on the standard of proof on the prosecution fell within both the classifications in the instant appeal, it was incapable of rectification under s 422 of the CPC.

Finally, we need to look at *Surandran a/l Rajaretnam v PP* [1998] 2 MLJ 49 where the appellant was convicted in the sessions court and H sentenced to imprisonment and fine. The appellant's appeal to the High Court was dismissed. It was contended that at the close of the prosecution case in the sessions court, the judge applied the prima facie standard of proof before he called upon the appellant to enter his defence. It was argued that at the time of the trial of this case, the proper standard of proof to be applied at the close of the prosecution's case was the beyond I reasonable doubt standard. Therefore, the sessions court judge erred in law in not holding that the prosecution was bound by law to prove its case beyond reasonable doubt at the close of its case. The deputy public prosecutor, while conceding that the judge did not apply the beyond

reasonable doubt standard, contended that whatever be the standard of proof applied, the judge would have arrived at the same decision.

This court held, in allowing the appeal, that the issue in that appeal was not as contended by the deputy public prosecutor. The issue was whether the judge applied the right and proper standard of proof at the close of the case for the prosecution. The issue of whether the prosecution at the close of its case is required to prove a prima facie case or to prove a beyond reasonable doubt case has now finally come to rest with the decision in *Arulpragasan a/l Sandaraju v PP* where it was held that the standard of proof at the close of the case for the prosecution is beyond reasonable doubt. Therefore, in the light of that decision, to all intents and purposes, the standard of proof to be applied in all cases whether before or after *Arulpragasan*'s decision, must necessarily be beyond reasonable doubt. Moreover, the amendment to s 180 of the CPC to provide for a prima facie standard of proof at the close of the case for the prosecution took effect only after 31 January 1997 and there is nothing in the amendment to give it retrospective effect. Therefore, the judge erred in law when he applied the prima facie standard of proof at the close of the case for the prosecution.

We must echo the sentiments expressed by Shaik Daud JCA when delivering the judgment of this court in that case (*Surandran a/l Rajaretnam v PP*), which fortifies the finding of the High Court in *Ishak Shaari v PP*, where he said (at p 52):

> Therefore, in the instant appeal, we were unanimously in agreement with the submission of Mr Karpal Singh that the learned sessions judge erred in law when he applied the prima facie standard of proof at the close of the case for the prosecution. We held that there was clear misdirection by the trial judge. We also held that a misdirection of this nature, which goes to the very root of the matter, is incapable of being cured by the provision of s 422 of the Criminal Procedure Code, as the misdirection involves a principle of general importance in the administration of justice.

We must add, however, that the question of applying the proviso or the subsection was not raised in that appeal. If it had been, the result in that appeal could well have been different.

Before we conclude, we must refer to relevant excerpts from *Mallal's Criminal Procedure* (4th Ed, 1957) where at p 590 it is stated:

> The omission to comply with the mandatory provisions of the Code ('the CPC') is not a mere irregularity which can be cured by recourse to this section: *Govindasamy v PP* [1949] MLJ 101.

In that case, the correct citation being *S Govindasamy v PP* [1949] MLJ 101, the accused was tried for murder. At the end of the case, the assessors gave their opinion that the accused was guilty of murder. The learned trial judge in his note recorded 'Assessors without retiring both find the accused guilty of murder'. The record did not show that the trial judge gave any judgment and that there was positive agreement between the trial judge and the assessors. The record only showed that the trial judge passed sentence of death following the opinion of the assessors that the accused was guilty of murder. It was held that as the learned trial judge had not

A complied with the provisions of s 198(i) of the CPC, the conviction and sentence must be quashed and that the omission in this case to comply with the mandatory provisions of the CPC was not a mere irregularity which can be cured by recourse to s 422 of the CPC.

Then, at p 591, the author says:

B *Effect of non-compliance with the statutory rules of procedure.* The effect of non-compliance with the statutory rules of procedure varies according to the gravity and the effect of the breach and the test in each case is whether the proceedings have resulted in a miscarriage of justice. Where the prescribed rules of procedure have not been followed, the test to find out whether there has been a mistrial is always essentially the same, namely whether there has C been a miscarriage of justice. If the appellate court is satisfied in point of fact that the accused has materially been prejudiced by the breach of procedure, clearly a failure of justice has occurred; if by reason of the breach of procedure, there has in effect been substituted another mode of trial for that prescribed by the legislature as affording the best means of obtaining a fair trial, it is presumed that a fair trial has not been accorded the accused, D and in that case also there has been a failure of justice. But the Court of Appeal should not disturb a decision, just and reasonable on the merits, merely because the proceedings disclose a flaw which is not proved to have worked injustice to the accused, although it may constitute a breach of the rules of criminal procedure. *R v Nga Po Min* ILR 10 Rang 511; AIR 1932 Rang 190 (FB). In many cases, it may be difficult to distinguish between an E illegality and irregularity, but it may be safely said that a mere error of procedure arising out of inadvertence will amount to no more than an irregularity. *Sarju v R* AIR 1932 All 28.

Error, omission or irregularity. This section is apparently based on the same principle which underlies s 168 of the Evidence Ordinance and applies only to mere errors of procedure arising out of inadvertence and not to F substantive errors of law. The section does not apply to cases of disregard or disobedience to mandatory provisions of the Code. See *Tirkha v Nanak* ILR 49 All 475; *R v Subrahmania Ayyar* LR 28 IA 257; *Abdul Rahman v R* LR 54 IA 96; ILR 5 Rang 53; *R v Chin Ah Chi* 4 Ky 589; *Mootoosamy v Municipality of Singapore* 4 Ky 350. The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be [an] extraordinary G extension of such a branch of administering the criminal law to say that, when the Code positively enacts that such a trial shall not be permitted, this contravention of the Code comes within the description of error, omission or irregularity. *R v Tan Chu Chooi* [1938] MLJ 230. See also *Pulukuri Kotayya v R* LR 74 IA 65.

H Finally, at p 592, the following passage appears:

Irregularity and illegality. Every error or irregularity, in so far as it contravenes the provision of the Code, is, in a sense, illegal, but it was to provide against these illegalities vitiating the proceedings that this section was enacted with, of course, the important reservation that, if the error or irregularity occasioned a failure of justice, then the section was not to apply. As pointed out by the I Privy Council in *Pulukuri Kotayya v R*, the distinction between irregularity and illegality is one of degree rather than of kind. There is no distinction between illegality and irregularity though only the word 'irregularity' is found in the section. The sole criterion is whether the accused person has been prejudiced or not. The object of procedure is to enable the court to do

justice, but if, in spite of even a total disregard of the rules of procedure, justice has been done, there would exist no necessity for setting aside the final order which is just and correct simply because the procedure was wrong. *Kapoor Chand v Surai Prasad* AIR 1933 All 264 (FB). A

As has been stated earlier, the appellant was convicted and sentenced by the sessions court on 18 October 1995. His appeal to the High Court was dismissed on 18 January 1997. This was about two weeks before the amendment to the CPC which took effect on 31 January 1997 providing for the prima facie standard of proof at the close of the case for the prosecution. B

The amendment has no retrospective effect as decided by the Federal Court in *Bahruni bin Ismail v PP* and *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1. The amendment came about because of the divided views of the Federal Court in *Arulpragasan a/l Sandaraju v PP* where the majority view was that the duty of the prosecution at the close of the prosecution's case is to prove a case beyond reasonable doubt. The standard of proof in the instant appeal, therefore, would be proof beyond reasonable doubt and not the prima facie test. C D

On these considerations, in applying the subsection to the situation in this appeal, as has been agreed to by both learned counsel and the learned deputy public prosecutor, the latter as regards the proviso in particular, we must find that the learned sessions court judge had misdirected herself when she applied the prima facie test. With us applying the more stringent reasonable doubt test to the facts of this case on the evidence available, we could only conclude that the result would certainly not be the same as we hold that no case had been made out against the appellant beyond reasonable doubt. Consequently, the defence of the appellant should not have been called. E F

We must reiterate that since this was a breach of an explicit provision of the CPC and a principle of general importance in the administration of justice, it was not an error, omission or irregularity for which a finding, sentence or order could be reversed or altered under s 422 of the CPC. This is irrespective of whether such error, omission or irregularity has occasioned a failure of justice. In effect, the said section cannot be applied for cases where the wrong standard of proof has been applied. G

This is certainly an illegality and not a mere error, omission or irregularity. But whether or not this was an issue in the High Court sitting as an appellate court, it can still be argued in a subsequent appeal before this court by applying the subsection as we did because the subsection has not differentiated between an appeal from a decision of the High Court sitting at first instance or of the High Court sitting as an appellate court. However, we would suggest that a similar provision be enacted for appeals from a subordinate court to the High Court so that the issue of illegality can be sorted out by the High Court either before, or without the necessity of, any further appeal to this court and to the Federal Court. Since the course of action that we took by virtue of the subsection would be equivalent to the powers of the High Court on appeal pursuant to s 316 of the CPC, H I

A any amendment to include a provision similar to the proviso could appropriately be made in that section.

Although in the final analysis we were deciding in favour of the appellant as stated in the proviso, we were of the view that the proviso was not applicable to the situation in this case as a substantial miscarriage of
B justice had occurred and we could not dismiss the appeal.

The appeal was, therefore, allowed and the conviction and sentence set aside. We also ordered the fine, if paid, to be refunded to the appellant.

Appeal allowed. Conviction and sentence set aside.

C Reported by David Lai

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